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Supreme Court, U.S.
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No. 97-1763

In The

Supreme Court of the United States

October Term, 1997

MATRIX COMMUNICATIONS CORPORATION,

Petitioner,

vs.

MCI TELECOMMUNICATIONS CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITIONER'S REPLY BRIEF

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I. INTRODUCTION

MCI's brief contains serious misrepresentations and omissions concerning the merits of the underlying case, the proceeding in front of the lower courts, and Matrix's position throughout. Rather than addressing all of MCI's misstatements, Matrix will confine its response to the core issues before this Court.

II. ARGUMENT

One of the fundamental issues in this case is whether MCI, one of the most powerful telecommunications corporations, can force small firms to arbitrate under circumstances where MCI has an undisclosed agreement with an arbitration provider concerning the arbitration of MCI'S disputes, which calls for substantial undisclosed payments by MCI to its arbitration panel and for *ex parte* communications between MCI and that arbitration provider, all of which are concealed from the parties opposing MCI in arbitration. It is undisputed that the MCI/JAMS Agreement creates such a relationship and since discovering the MCI/JAMS Agreement, it has been the position of Matrix that MCI's failure to disclose the Agreement and the full nature and scope of its relationship with JAMS violate federal statutes and represents an unprecedented assault on both the concept of fairness and the principles that must safeguard the integrity of the arbitration process.

Rather than addressing this important question on its merits, MCI totally distorts the true facts by asserting that "petitioner also conceded that corporate arbitration programs are commonplace" (MCI Brief, p. 5) and by implication that the MCI/JAMS Agreement is also commonplace. What MCI fails to disclose to this Court is the balance of the statement by Counsel for Matrix that "[w]hat is not commonplace is elaborate undertakings between the corporate sponsor and the arbitration service which are not disclosed to the participants." (Tr. p. 12)

MCI's argument is based on a statement lifted totally out of context. (Tr. pp. 6, 11 and 12) The transcript reveals the following statements made by Matrix's counsel at the same hearing:

a. [The MCI/JAMS Agreement is] . . . an undisclosed agreement . . . which we believe is unprecedented in this industry. (Tr. p. 6);

b. . . . this is not a customary agreement. (Tr. p. 6);

c. There's no evidence in the record that anybody else in the world had these kinds of agreements. (Tr. p. 11); and

d. . . . We will produce expert testimony which will contradict the recent submissions by MCI that this is something commonplace. (Tr. p. 12).

And finally the full accurate statement:

e. What is commonplace is corporation-sponsored arbitration. What is not commonplace is elaborate undertakings between the corporate sponsor and the arbitration service which are not disclosed to the participants. (Tr. p. 12)

The transcript is entirely different than what MCI would have this Court believe. What Matrix has consistently said in open Court and in all of its pleadings is that the undisclosed MCI/JAMS Agreement is not "commonplace" but, in fact, is an unprecedented denial of due process.

MCI further asserts that "Petitioner conceded it was not challenging the impartiality of the arbitrator." (MCI Brief, pp. 5, 9 and 14) This is totally untrue. The fact is, Matrix did not initially object to the JAMS arbitrator from the outset because the arbitrator was appointed by JAMS prior to Matrix learning of the undisclosed agreement between MCI and JAMS and the arbitrator did not disclose the agreement to Matrix upon being appointed.

However, since discovering the undisclosed MCI/JAMS Agreement, Matrix has always contended that the failure to disclose the Agreement is a serious breach of the disclosure requirements of the Code of Ethics for Arbitrators in Commercial Arbitrations and constitutes a "manifest violation of the strict morality and fairness Congress would have expected on the part of the arbitrator and the other party in the case" as articulated by this Court in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968). As such, the requisite impartiality of the arbitrator is so seriously compromised by not disclosing the MCI/JAMS Agreement that Matrix is not required to continue with the arbitration much less demonstrate bias on the part of the arbitrator.[1]

MCI makes the further specious argument that any conflict created by the MCI/JAMS Agreement does not implicate JAMS' arbitrators because they are not employees of JAMS, are not parties to the Agreement, and are independent of JAMS. (MCI Brief pp. 9, 12 and 14) What MCI fails to disclose is that JAMS is a for profit corporation in which JAMS' arbitrators are the shareholders, officers and directors. Furthermore, JAMS' arbitrators are required by JAMS to provide all their alternative dispute resolution services exclusively through and for JAMS. As such, the arbitrators are not independent of JAMS but have an intertwined relationship with JAMS the corporation in which they directly benefit financially from the secret payments MCI makes to JAMS.

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[1] The lack of integrity in the MCI/JAMS arbitration process and the partiality of the arbitrator are further evidenced by the arbitrator's decision to dismiss Matrix's claims with prejudice without ever hearing the claims and while the parties were still awaiting a ruling by the Court of Appeals.

A. The Decision Below Affirming The Denial Of Petitioner's Rule 60(b) Motion Was Not Correct And Is Not Consistent With The Controlling Precedent Of This Court

MCI seeks to distinguish *Commonwealth Coatings, supra,* by stating that "the Court vacated an arbitration award because one of the arbitrators had significant business dealing with a party and failed to disclose that business association to the other participants in the arbitration." What MCI describes as "a significant business relationship" involved fees of about $12,000.00 paid over a period of four or five years but was no longer an ongoing relationship. In contrast, MCI's relationship with JAMS is an ongoing relationship in which MCI has secretly paid over $280,000.00 to JAMS and continues to pay each year $60,000.00 to JAMS plus providing tens of thousands of dollars of free long distance services to JAMS, and paying referral fees when JAMS asserts jurisdiction over cases. All this is undisclosed to parties opposing MCI in arbitration and is in addition to the other compensation JAMS receives as MCI's Tariff arbitration administrator.

MCI's narrow reading of *Commonwealth Coatings* does not account for the gravity and scope of this Court's decision which expressed concern not only with preserving the impartiality of arbitrators but was more broadly concerned with safeguarding "the strict morality and fairness" required in "the arbitration process." In writing for this Court, Mr. Justice Black stated that "[w]e can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias." 393 U.S. at 149. It is the integrity of the "arbitration process" that this Court was "scrupulous to safeguard" in *Commonwealth Coatings.* Similarly, if not overturned, the case before this Court will serve to undermine, if not destroy entirely, the integrity of the "arbitration process."

MCI further argues that Matrix should have known there was such an agreement between MCI and JAMS. This argument belies the fact that neither Matrix nor any other party opposing MCI in arbitrations before JAMS had any knowledge of this undisclosed Agreement and that MCI's failure to disclose the MCI/JAMS Agreement violates: a) four major provisions of the Federal Communications Act (§§ 201, 202, 203 and 210); b) Section 41.21 of the Code of Federal Regulations; c) Rule B-4.02 of MCI's Tariff; d) the Code of Ethics for Arbitrators of Commercial Disputes; and e) Sections 1-14 of the Federal Arbitration Act. MCI does not dispute in its Brief these violations.

B. Matrix Raised The Filed Tariff Doctrine In Both The District Court And Appellate Court

In its Brief MCI cites Section 203 of the Communications Act, commonly referred to as the filed tariff doctrine, when its states that "[a]s a common carrier under the Federal Communications Act . . . MCI has filed a tariff with the Federal Communications Commission that contains all of MCI's charges, classifications, practices, and regulations for the provision of telecommunications services to its telecommunications customers." In spite of MCI's representation, the actual fact is that MCI Tariff does not "contain[ ] **all** of MCI's **charges, classifications, practices,** and **regulations**" (emphasis added) concerning the provision of telecommunications services. In fact, MCI/JAMS Agreement violates all four principles of the filed tariff doctrine:

> **Charges.** By providing JAMS free long distance service, the MCI/JAMS Agreement creates charges that are not disclosed in the MCI Tariff.
>
> **Classifications.** By providing JAMS free long distance service, the MCI/JAMS Agreement creates a classification of customer, in which a customer receives free long distance

services in exchange for providing dispute resolution services for MCI, that is not disclosed in the MCI Tariff.

Practices. By providing for substantial undisclosed payments and perks to be made by MCI to JAMS and by establishing the exchange of extensive *ex parte* communications between MCI and JAMS, the MCI/JAMS Agreement created practices that are not disclosed in the MCI Tariff.

Regulations. By failing to disclose the MCI/JAMS Agreement in the MCI Tariff, MCI created regulations concerning how certain MCI disputes are to be arbitrated by JAMS that are not disclosed in the "Rules and Regulations" section of the MCI Tariff as required by the filed tariff doctrine.

Rather than addressing these substantive issues, MCI erroneously claims that Matrix has waived this issue by failing to raise it before the District Court or the Court of Appeals. This is untrue. Matrix raised the issue before the District Court, in its Reply to Memorandum in Opposition to Defendant's Motion for Relief From Judgement, March 5, 1997, Page 28, as follows:

> [T]he public rate doctrine requires full and complete disclosure of a carrier's rates and regulations. *Payphone Concepts, Inc. v. MCI Telecommunications Corp.* 904 F. Supp. 1202, 1207 (D. Kan. 1995) . . . MCI was not entitled to omit from its Tariff information that it would have preferred remain secret respecting its business relationship with JAMS – and at the same time, require Matrix to be bound by those terms. If such an omission were permitted without consequence, MCI would secure the benefit of the public rate doctrine without enduring its burden of full disclosure.

Matrix also fully addressed the issue of the filed tariff doctrine in its opening Appellate Brief to the Court of Appeals as follows:

> The gravity of this nondisclosure is all the more graphic and alarming since there was no way for Matrix to learn of the undisclosed agreement between JAMS and MCI when one considers the fact that:
>
> a) Section 61.74 of the C.F.R. specifically provides that the MCI Tariff must be an all encompassing document and may not reference any other documents. Thus, there would be no basis for Matrix to think there would be an agreement between MCI and JAMS since its existence would violate the Code of Federal Regulations.
>
> b) Section 203 of the Federal Communications Act, [commonly referred to as the filed tariff doctrine] requires that the MCI Tariff be an all encompassing document that is posted and kept in an open place for inspection. Thus, there would be no basis for Matrix to think there would be an agreement between MCI and JAMS whose existence would be "unlawful" under the terms of the Federal Communications Act. . . .
>
> It is unreasonable to expect Matrix to assume that JAMS and MCI would have a concealed agreement that violates three major provisions of the Federal Communication Act, the Federal Arbitration Act, the Code of Federal Regulations and the Code of Ethics for Arbitrators in Commercial Disputes.

(Matrix's Opening Appellate Brief, June 27, 1997, p. 42).

This case strikes at the very heart of the filed tariff doctrine because it undermines the full disclosure principle that is the cornerstone of all tariff regulated industries

including electric power, natural gas, railroad transportation and, as in this instance, the telecommunications industry.

C. The Tariff's Limitation Of Liability Exception For Willful Misconduct Overrides And Nullifies Any Obligation To Arbitrate

MCI further asserts that the MCI Tariff does not control this dispute between MCI and Matrix. This new argument by MCI directly contradicts MCI's argument before the District Court that this case is subject to the primary jurisdiction of the Federal Communications Commission because it involves a "claim in which tariff is center of controversy." (See footnote on p. 17 of MCI's Surreply in Opposition, March 17, 1997) In fact, MCI has based its entire case on the premise that the MCI Tariff is the controlling document in this dispute. The Tariff is indeed at the center of this controversy because it is the Tariff, as drafted by MCI, that designates JAMS as the arbitration provider but fails to disclose the MCI/JAMS Agreement and it is the MCI Tariff that MCI relies on in its effort to deny Matrix its constitutional and statutory rights and remedies.

MCI ignores the fact that the rules of tariff construction (namely the filed tariff doctrine) expressly prohibit both MCI's failure to disclose the MCI/JAMS Agreement. The Brief by MCI also ignores the fact that over one hundred years ago this Court in *Primrose v. Western Union Telegraph Co.*, 154 U.S. 1 (1894) held that carriers like MCI cannot use their tariffs to limit their liability based on willful misconduct and that Rule B-4.02, which states "MCI's liability for willful misconduct . . . is not limited by this tariff" is an expression of this Court's decision in *Primrose*.

Furthermore, MCI does not dispute the finding in *MCI Telecommunications Corp. v. TCI Mail, Inc.*, 772 F. Supp. 64 (D.R.I. 1991), that "the tariff as a whole" must be considered "otherwise many of the provisions of the MCI

Tariff would be meaningless" but attempts to pigeon-hole the decision as only applying to "rate disputes governed by the tariff." (MCI Brief p. 17) This narrow reading of *TCI* is not supported by the court's decision which states:

> *The entire MCI Tariff must be controlling, including the "willful misconduct clause . . . ".* The MCI Tariff itself does not clearly preclude a contract or tort claims against MCI based on its alleged "willful misconduct". . . . Analysis of the Communications Act of 1934 supports this conclusion.

The court's decision specifically preserves "contract" and "tort" claims like those asserted in Matrix's First Amended Complaint and is not limited to "rate disputes" as MCI suggests. The *TCI* court also found that "[i]f TCI can prove 'willful misconduct' by MCI . . . the MCI Tariff permits recovery for liability arising out of such conduct" and MCI Tariff Rule B-4.02 designates the District Court as the appropriate forum for deciding such disputes. Matrix's First Amended Complaint was in five counts, all of which allege willful misconduct on the part of MCI. As such, Matrix was correct to proceed in Court under its First Amended Complaint.

MCI is attempting to abandon its own tariff because the regulatory scheme that grants tariffs the power of law also contains safeguards that require MCI to disclose the MCI/JAMS Agreement in its publicly filed tariff and expressly preserve Matrix's right to proceed in Court under its First Amended Complaint.

D. There Is A Conflict Between The First And Ninth Circuits

MCI claims that the conflict between the Ninth Circuit's decision in *Graham Oil Co. v. ARCO Products Co.*, 43 F.3d 1244 (9th Cir.), cert. denied, 116 S. Ct. 275 (1995), and the First Circuit's opinion in this action "fails because this case does not involve a statute enacted to protect parties in Petitioner's position." This is untrue. In *I.T.T. World*

Communications, Inc., 30 F.C.C.2d 101 (1970), the FCC found that one of the principal functions of the Communications Act is to assure equitable treatment of parties by common carriers, particularly small entities that lack the bargaining power of larger entities. The Communications Act, therefore, operates as a safeguard against the enormous power of multinational telecommunications companies like MCI just as the Petroleum Marketing Protection Act ("PMPA") acts as a safeguard against the enormous power of multinational petroleum companies like ARCO.

Lastly, MCI does not dispute that inherent constitutional and statutory rights are denied Matrix by the MCI Tariff.

III. CONCLUSION

This Court should grant the Writ of Certiorari and hear this case.

Respectfully submitted,

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